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THINK LIKE A JURIST: WHAT DOES IT MEAN?

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ДУМАЙ ЯК ЮРИСТ: ЩО ЦЕ ОЗНАЧАЄ?

АНОТАЦІЇ (ABSTRACTS), КЛЮЧОВІ СЛОВА (KEY WORDS)

Problem statement. This article deals with the general problem of the connection between legal thinking, legal argumentation and, on the other hand, logic. Although this connection seems clear and undeniable since ancient times, various discussions about it continue to this day. The **purpose** is to explore one important aspect of this connection, namely, does traditional formal logic determine the relevant form of a jurist's thinking and argumentation completely? To reach this purpose, the **method** of comparative analysis is employed both synchronically and diachronically. First, in order to substantiate the importance of the issue, a diachronic comparison of several basic approaches is carried out (G.W. von Leibniz, O.W. Holmes Jr., etc.). Then a comparative analysis of the views of some contemporary experts is carried out, especially Ilmar Tammelo and Stephen Toulmin. As a **result**, it is argued that there is special legal validity in the field of law. Legal validity is determined primarily not by the value of the formal or material true, but by the value of the right directly and mainly. It differs essentially from formal-logical validity. Legal validity is not the subject of formal logic, but special legal logic and, more broadly, informal logic. It is pointed out that traditional formal logic does not determine the relevant form of legal thinking and argumentation completely, because there is the essential difference between formal-logical validity and legal validity. In other words, formal logic is neither sufficient nor necessary to think like a jurist. In this regard, it is shown that the logical standard of proof is not sufficient to determine the relevant form of valid legal proof, for example, proof beyond a reasonable doubt. Moreover, there are at least three kinds of legal proof – not only proof without reasonable doubt, but also proof by clear and convincing evidence, proof by the preponderance of the evidence. Each of them has its own special standard, which differs significantly from the formal-logical one. The **conclusion** is this: one cannot say that formal logic is useless in the field of law; however, in order to think and argue like a successful jurist, one must grasp and use special legal logic without any exceptions (legal logic belongs to the contemporary informal logic domain).

Key words*: legal thinking; legal argumentation; legal validity; legal logic; formal-logical validity; formal logic; informal logic*

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Постановка проблеми. У статті досліджується загальна проблема зв'язку юридичного мислення, юридичної аргументації та, з іншого боку, логіки. Хоча цей зв'язок з давніх давен видається ясним і беззаперечним, дотепер щодо нього тривають різноманітні дискусії. Моя **мета** полягає у тому, щоб дослідити один важливий аспект цього зв'язку, а саме: чи детермінує традиційна формальна логіка релевантну форму мислення й аргументації юриста повністю? Для досягнення цієї мети **метод** компаративного аналізу використовується синхронно і діахронно. Спершу в обґрунтуванні важливості дослідження виконується діахронне порівняння низки базових підходів (Г.В. фон Ляйбніц, О.В. Холмс мол. та ін). Потім виконується компаративний аналіз поглядів кількох сучасних фахівців, зокрема Ільмара Таммело й Стівена Тулміна. В **результаті** аргументовано, що у полі права існує особлива юридична валідність. Юридична валідність переважно детермінована не цінністю формальної чи матеріальної істини, а безпосередньо і головно цінністю права. Вона істотно відрізняється од формально-логічної валідності. Юридична валідність є предметом не формальної логіки, а особливої юридичної логіки та, ширше, неформальної логіки. Підкреслено, що фор-

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мальна логіка не детермінує релевантну форму юридичного мислення й аргументації повністю, оскільки існує істотна відмінність між формально-логічної валідністю та юридичною валідністю. Іншими словами, формальна логіка є ані достатньою, ані необхідною для того, щоб думати як юрист. В такому зв'язку показано, що логічний стандарт доведення не є достатнім для визначення релевантної форми валідного юридичного доведення, наприклад, доведення поза розумним сумнівом. Більше того, існують щонайменше три види юридичного доведення – не тільки доведення поза розумним сумнівом, а й доведення через ясні й переконливі докази, доведення через перевагу у доказах. Кожен з них має свій особливий стандарт, який суттєво відрізняється од формально-логічного. **Висновок** такий: не можна сказати, що формальна логіка у полі права не потрібна; однак задля того, щоб думати й аргументувати як успішний юрист слід зрозуміти юридичну логіку та користуватися нею без будь-яких виключень (юридична логіка належить до області сучасної неформальної логіки).

Ключові слова: *юридичне мислення; юридична аргументація; юридична валідність; юридична логіка; формально-логічна валідність; формальна логіка; неформальна логіка*

Problem statement

A jurist thinks and argues in a multidimensional configuration space. This configuration space has not only physical space-time dimensions, but also legal, logical and rhetorical ones. My article deals only with the logical dimension of legal thinking and argumentation.

It seems obvious that proper legal thinking and corresponding argumentation must be correct both in legal content and in the relevant form. However, is this relevant form, that is, all the elements and due structure of a jurist's thinking, determined by traditional formal logic completely? More broadly, what the connection is between legal thinking, legal argumentation and, on the other hand, logic, especially formal logic?

Without plunging into the foggy depths of history, let's consider the authentic statement of Gottfried Wilhelm von Leibniz, who had a legal education and was well acquainted with legal practice of the 17th century.

We may even boldly advance an odd but true paradox, that there are no authors whose manner of writing resembles the style of Geometers more than the style of the Roman jurisconsults whose fragments are found in the Pandects. After granting them certain assumptions based on some custom, or else, to be sure, on some rule established among them, we admire these jurists for their consistency and applications of logic … (Leibniz 1951 : 38).

It seems clear that Leibniz evaluated the applications of logic by the Roman jurists very highly. The relevant manner, or essentially the logical form of thinking and, naturally, writing, of the jurists was evaluated as very resemble to the demonstrative style of mathematicians.[1] Moreover, this manner was proclaimed the general standard not only for all jurists, but also for philosophers.

Two centuries later, the well-known American judge and legal scholar Oliver Wendell Holmes Jr. proposed a completely different approach.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics (Holmes 2011 : 5).

Holmes' main idea is that real law, professional thinking, argumentation and decision-making by real jurists are not determined by logic. More accurately, none of this is completely determined by the logic akin to mathematics, that is, formal logic. Since the time of Holmes, this approach has had many supporters, especially in the domain of common law.

Nevertheless, in 1955, the Estonian-Australian logician Ilmar Tammelo insisted that *juristic logic is formal logic employed in legal reasoning. It does not constitute a special branch, but is one of the special application of formal logic* (Tammelo 1955 :

[1] *"Even if it is only a question of probabilities we can always determine what is most probable on the given premises. True this part of useful logic is not established anywhere, but it is put to wonderful uses in practice when there are hypotheses, indications, and conjectures involved in ascertaining degrees of probability among a number of reasons appearing on the one side or another of some important deliberation"*, – Leibniz pointed out (ibid.). Today there is some reason to insist, *this piece of useful logic* was an early embryo of special legal logic (Tiaglo 2015 : 242).

278). Hans Kelsen, the renowned theorist and philosopher of law, strongly supported this approach (Kelsen 1979 : 216). This is contrary to the approach proposed by Holmes.

The above examples demonstrate very heterogeneous approaches to understand the connection between legal thinking, legal argumentation and, on the other hand, logic, in particular formal logic. How to analyze and assess this heterogeneity today? Which approach is more fitting for a nowadays jurist?

Is formal logic sufficient to think like a jurist?

Formal logic, by definition, is sufficient to think like a jurist only if any legal problem and corresponding argumentation is given the relevant form solely using a set of basic norms and standards of this logic. Considering this condition, let's analyze the following passage, proposed by the contemporary American jurist and legal scholar Ruggiero J. Aldisert.

No one is suggesting that briefs can be written, arguments made and cases decided solely by reference to the canons of logic. Where this so, the legal profession would simply move to analysis by computer, because the computer is the paradigm of formal logic. Value judgments reflecting the views of advocates and judges form the critical decisional points in the law. Rules of logic do not make these decisions. They are simply meant to implement them, when these judgments are made, the formal reasoning process sets in to test the validity of the propositions constituting the argument (Aldisert 1997 : 3).

Aldisert supports the approach proposed by Holmes, at least in part: the *canons* of formal logic are not sufficient to decide on any value judgments, which is significant for legal thinking. Moreover, one can add that this insufficiency is not limited to the problem of value judgments only; it is broader and deeper.

Principal insufficiency of traditional formal logic to determine the relevant form of legal thinking and argumentation was substantiated by Chaim Perelman, Stephen Toulmin and others in the middle of 20th century. For instance, Toulmin, in his well-known 1958 book "The Use of Argument", pointed out that *from the time of Aristotle logicians have found the mathematical model enticing... Unfortunately, an idealized logic, such as the mathematical model leads us to, cannot keep in serious contact with its practical application.* Along with *idealized logic*, new *working logic* conformed to jurisprudence rather than mathematics should be introduced and expediently used (Toulmin 1958 : 10, 147).

Over time, this trend has spawned informal logic.

Informal logic designates that branch of logic whose task is to develop non-formal standards, criteria, procedures for the analysis, interpretation, evaluation, critique and construction of argumentation in everyday discourse … (Johnson and Blair 2000 : 94). It should be added that everyday discourse includes also "stylized" sub-discourses of the special sciences or professional activities, for instance, legal activity.

To discuss the issue deeper, let's take into account the statement that Ilmar Tammelo insisted on.

The problem of validity is wider than the problem of material or formal truth, because we can speak of validity also in relation to other values than the value of the true (e.g., in relation to the good, the right, and the beautiful) (Tammelo 1955 : 280).

It is quite clear that formal truth and, respectively, formal-logical validity are neither unique nor prioritized absolutely.

According to Toulmin, *validity is an intra-field, not an inter-field notion. Arguments within any field can be judged by standards appropriate within that field, and some will fall short; but it must be expected that the standards will be field-dependent, and that the merits to be demanded of an argument in one field will be found to be absent (in the nature of things) from entirely meritorious arguments in another* (Toulmin 1958 : 255).

Hence, in the field of law special legal validity exists. Legal validity is determined primarily not by the value of the formal or material truth, but by the value of the right directly and mainly. It differs from formal-logical validity essentially. Legal validity is not the subject of formal logic, but special legal logic and, broader, informal logic (Tiaglo 2020).

In this regard, one may mention, for example, that legal proof is not just logical proof employed in legal reasoning. The logical standard of proof is not sufficient to determine the relevant form of real legal proof, for instance, proof without reasonable doubt. Moreover, there are at least three kinds of legal proof – not only proof without reasonable doubt but also proof by clear and convincing evidence, proof by the preponderance of the evidence. Each of them has its own special standard, which differs from the formal-logical one significantly (Tiaglo 2018).

Is formal logic necessary?

Formal logic is not sufficient to determine the legally valid form, all the elements and the due structure of legal thinking and argumentation. Is formal logic necessary here? By definition, formal logic is necessary only if any violation of the logic norms or standards entails an essential violation of legal thinking; any logical fallacy is unacceptable here. However, is it so?

The principle of identity is a cornerstone of formal logic and, respectively, of formal-logical validity. Accordingly, formal logic prohibits *argumentum ad hominem*, or *attacking the person*, as a gross violation of this principle, that is, as an unacceptable logical fallacy.

Nevertheless, paragraph 2 of article 96 of the Criminal Procedure Code of Ukraine states that *in order to prove unreliability of witness's testimonies, a party may produce testimonies, documents as confirmation of witness's reputation, in particular, with regard to his conviction for knowingly misleading testimonies, deceit, fraud or any other acts, which confirm dishonesty of the witness* (Kryminalnyj Protsesualnyj Kodeks Ukrainy 2012).

What is this if not *attacking the person*? And this is not surprising. Douglas Walton, the well-known Canadian researcher in informal logic, stated the following.

Reasoning from the personal credibility of a witness, to a conclusion to increase or decrease the credibility one attaches to the proposition asserted by the witness, can be a reasonable argument in some instances. It is reasonable if such a conclusion is arrived at within the context of a larger body of evidence in a case… the fallacy is committed when the impact of the ad hominem is out of proportion to its true weight and relevance as part of a larger body of evidence in a case (Walton 1998 : 280–281).

About a century before Douglas Walton, the famous American lawyer Francis Wellman, in his classic book "The Art of Cross-Examination", described *cross-examination as to credit* as a regular procedure in court practice.

The preceding chapters have been devoted to the legitimate uses of cross-examination the development of truth and exposure of fraud. Cross-examination as to credit has also its legitimate use to accomplish the same end, Wellman insisted (Wellman 1997 : 196). As one can see, *argumentum ad hominem* provides a significant presupposition for the *cross-examination as to credit*.

Hence, *argumentum ad hominem*, which is an undoubted formal-logical fallacy, is not prohibited in the field of law. On the contrary, it is accepted, it works regularly. This demonstrates that formal logic is not necessary here.

Conclusion

As a result, the following conclusion seems reasonable. It is not to say that formal logic is useless in the field of law. However, formal logic does not determine the relevant form of legal thinking and argumentation completely, because there is the essential difference between formal-logical validity and legal validity. In other words, formal logic is neither sufficient nor necessary to think like a jurist. At the same time, in order to think and argue like a successful jurist, one must grasp and use special legal logic without any exceptions. Legal logic belongs to the contemporary informal logic domain.

Conflict of interest

The author declares that there is no conflict of interest regarding the publication of this article.

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